SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 724

BENARD SOUTH AND HAROLD C. FLEMING
Plaintiffs-Appellants

vs.

JAMES PETERS as Chairman of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: MRS. IRIS BLITCH, as Acting Secretary of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC PARTY: and BEN W. FORTSON, JR., Secretary of State of Georgia.

Defendants-Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

APPELLANTS' BRIEF ON PETITION FOR REHEARING

HAMILTON DOUGLAS, JR.
MORRIS B. ABRAM
Counsel for Appellants.

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SUMMARY OF MATTERS INVOLVED

The Opinions Below

The majority opinion (R) and Judge M. Neil Andrews' strong dissenting opinion (R) filed in the District Court below will no doubt have been read by this Court. The majority opinion frankly admits the gross

discrimination against which Appellants complain. Judge Andrews' dissent might well be adopted by Appellants as their brief, so concisely and clearly does it distinguish Appellants' case from the "political question" cases which the majority opinion felt itself bound to follow.

Plaintiffs' Pleadings

The verified Complaint below (R) as amended (R) set forth in detail the facts involved and the issues of law in this case. It was filed on January 25, 1950, by two citizens and qualified voters of Fulton County, Georgia, the largest county in the state, and the county whose residents are the most grossly discriminated against by the Georgia County Unit System.

Defendants' Pleadings

The Appellees, Defendants below, the Secretary of State of Georgia, the Chairman and Secretary of the Georgia State Democratic Executive Committee, the Committee itself, and the Georgia State Democratic Party filed an Answer in which were set up numerous grounds, jurisdictional and substantive (R), which were treated by the Court in the nature of a "Motion to Dismiss."

Jurisdiction in District Court

Jurisdiction of the District Court was invoked under Title 28, United States Code, Section 1343(3), which was derived from the so-called "Civil Rights Act" of 1871 and provides original jurisdiction over any civil action authorized by law "to redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . ."

The Georgia Statute in Issue

The complaint charges in detail (R) that the Georgia Nominations by County Units Act of August 14, 1917

(Georgia Laws 1917, pp. 183-189), insofar as it requires a county unit method of consolidating votes and certifying nominees, is unconstitutional and void.

Plaintiffs' Prayer

The Complaint below prays for relief in two respects, conjunctively or in the alternative:

(a) That the court permanently enjoin the named Defendants from carrying out their respective functions under the County Unit System in such manner as to nominate candidates of the Georgia Democratic Party by the county unit method.

(b) That, irrespective of injunctive relief, the Court declare the County Unit Statute void insofar as it requires nominations for statewide offices by the County Unit System of consolidating votes and certifying nominees.

Three-Judge Court Requested

The Complaint below (R) contained the request that a Three-Judge Court be summoned in conformity with Title 28, United States Code, Section 2281, one of the objects of the suit being to obtain a permanent injunction to restrain the enforcement, operation and execution of statutes of the State of Georgia by restraining the action of a State official in the enforcement of said statutes. The Three-Judge Court below was called in accordance with that provision of law and Plaintiffs' request. (R)

Judgment Order

On March 15, 1950, the District Court (speaking through a majority of its number) handed down a written opinion (R) stating the Issues, Findings of Fact, Conclusions of Law, and including a Final Judgment Order denying all relief prayed and dismissing the Complaint.

Jurisdiction on Appeal

Under the provisions of Title 28, United States Code, Section 1253, this direct appeal to the Supreme Court of the United States was filed on March 17, 1950, and was allowed by order of that date. (R) The Assignments of Error and other Appeal Papers are set out in the Record. (R)

Specification of Assigned Errors Intended to Be Urged

Appellants intend to rely upon and urge to the Court in this Brief all of the Assignments of Error heretofore specified for the Record, which in essence are as follows:

1. The Court below erred in dismissing the complaint.

2. The Court below erred in refusing to grant a permanent injunction as prayed.

3. The Court below erred in refusing to grant a declaratory judgment as prayed, in conjunction with or independently of, injunctive relief.

STATEMENT OF THE CASE

Background of the Case

Appellants, Plaintiffs below, are qualified to vote in the Georgia Democratic Primary Election for all Statehouse officers and for United States Senator. (R) When the bill was filed, Georgia law required that all statewide primary elections were to be held on September 13, 1950.

After the bill was filed the Georgia General Assembly, on recommendation of the present State Administration, repealed the law making the date certain for primary elections and placed the responsibility of selecting the date with the State Executive Committee of the Party conducting the primary. The Georgia State Democratic Executive Committee thereupon moved the date for the Georgia

Democratic Primary forward almost three months to June 28th, 1950. (R)

No primary election is required by law to be held in Georgia, but when one is held the law specifically provides the manner in which it must be conducted and absolutely stipulates that the nominees be determined by the so-called County Unit System.

At the first indication that a statewide Democratic Primary Election was to be held in 1950 (as has been unvarying practice of the Georgia Democratic Party for more than 50 years) (R) plaintiffs filed their bill on January 25, 1950, naming as defendants the instruments by which the County Unit System is made effective, that is, the Secretary of State of Georgia, the State Executive Committee and its Chairman and Secretary, and the Party itself.

Gross Ballot Dilution

Plaintiffs asked an injunction against dilution of their ballots by the county unit method of consolidating votes, and also a declaration that the Georgia Nominations by County Units Act of August 14, 1917 (Georgia Laws 1917, pp. 183-189) is unconstitutional insofar as it provides a county unit method of consolidating votes and determining nominees.

Plaintiffs asserted that as qualified voters they are permitted by law to register and to vote, and that their votes are protected by law against fraudulent counting. Plaintiffs complained that after their ballots are counted the county unit statute under attack requires the defendants to so dilute the value of plaintiffs' ballots as to amount to a fraud against plaintiffs and a deprival of their constitutional rights. As citizens of Fulton County, the largest in the State, plaintiffs showed the Court that their votes after dilution are given as little as 1/122 the effect of votes in another county.

Plaintiffs asserted that this dilution and practical ignoring of their ballots for all officials nominated by statewide vote (there is no issue in this case of legislative malproportion) violates the Equal Protection Clause of the 14th Amendment, and, as it affects the nomination of United States Senators, violates the Privileges and Immunities Clause of the 14th Amendment and the guarantee of popular election of Senators as provided in the 17th Amendment.

No Drastic Remedy Urged

Plaintiffs' bill seeks to overturn no election result, nor does it attempt to prevent the holding of a primary. It merely seeks to prevent election officials from diluting plaintiffs votes so as to make their effect fractional as compared to those cast by other qualified voters for the SAME officials.

What the County Unit System Is

The County Unit System is a method of consolidating the votes cast in statewide primary elections. In use by the Georgia Democratic Party prior to 1917 as a party rule, it was that year written into the State laws by the "Neill Primary Act." It has never been used in general elections, nor have the people of Georgia ever been given the opportunity to vote upon it.

There is now pending before the people in the 1950 General Election a proposed constitutional amendment, initiated by a two-thirds vote in both houses of the General Assembly, which would extend the County Unit System to the general elections. The General Assembly which adopted this proposal reflects in its composition the disproportions achieved through the County Unit System.

How the County Unit System Operates

Nominees of the Democratic Party of Georgia are chosen in the Democratic Primary. Since Georgia is a one-party state, nomination by the Democratic Party for statewide offices assures election. In the Democratic Primary, ballots are counted on a county-wide rather than on a statewide basis. Each of Georgia's 159 counties is given the weight of a certain number of unit votes, twice the number of representatives allotted that county in the State House of Representatives: The 8 most populous counties each have 6 unit votes; the next 30 most populous, 4 unit votes; and the remaining 121 counties, 2 unit votes.

A candidate for a given state office who receives a plurality of the votes cast within a county wins the entire unit vote of that county. The unit votes of all the counties are then tallied and the candidate receiving a plurality of the unit votes wins (except that for Governor and United States Senator a unit-vote majority, instead of a plurality, is required and a runover primary is held if necessary to choose between the two candidates receiving the most unit votes in the first primary.)

The Inequities of This System

The counties are each given an arbitrary and fixed unit vote with little regard to the relative size of their populations. As a consequence, the County Unit System gives far greater weight to votes in some counties over votes cast in others. For instance, in the most recent statewide Democratic Primary, in 1948, one vote cast in Chattahoochee was equal to 122.2 votes cast in Fulton. Similar inequities occurred throughout the State in varying ratios.

When a candidate wins a county's unit vote, the ballots cast in that county for his opponents are thereby killed and are not registered in the statewide count under the County

Unit System. (For example, suppose three candidates were running in a statewide race and in a given county, candidate A got 200 votes, candidate B 201 votes, and candidate C 202 votes. Candidate C would then win that county's unit vote. The votes of the 401 people who voted for A and B would thereby be killed and would not figure in the statewide count for those candidates.) Frequently the shift of a few such votes from one county to another would completely change the results of a state election.

Whether calculated from the population comparisons of the various counties or from the votes cast in each county in primaries, there are ratios of great discrimination against the citizens of Fulton County as compared with citizens in every other county in the state. These discrimination ratios are set forth in the exhibits attached to the complaint (R). These exhibits show that on a population basis the Georgia average of discrimination against Appellants is 11.5. The average Georgia inhabitant thus has eleven times as much voting power as one of the plaintiffs.

This ratio of discrimination is constantly growing to the increased disadvantage of Appellants who are voters in Fulton County. In 1920 the average ratio of discrimination was 5.8; by 1930 the ratio had risen to 8.4; by 1940 to 9.7; in 1948 it was 11.5. (R).

Some Sample Discriminations

This ratio of discrimination between inhabitants in Fulton and in the small counties of the state is exceedingly great: Based on population, some typical ratios are as follows:

An Echols inhabitant has 65.0 times the voting power of a Fulton voter.

A Dawson inhabitant has 42.8 times the voting power of a Fulton voter.

A Quitman inhabitant has 52.0 times the voting power of a Fulton voter.

A Schley inhabitant has 35.6 times the voting power of a Fulton voter.

A Towns inhabitant has 39.0 times the voting power of a Fulton voter.

Of Georgia's 159 counties, voters in 73 counties have more than 15 times the voting power of inhabitants in Fulton County.

The 67 smallest counties in Georgia have a combined population which is less than the population of Fulton County. But their combined unit vote is 134 to Fulton's 6.

Under this system it is entirely possible for counties totaling 26% of the population of the state to carry an election for Governor or United States Senator with the required 206 unit votes, and the other counties with 3/4 of the state's population, are in effect completely disfranchised. It is futile to figure that the vote of any citizen in any of them is worth 1/10 or 1/50 or 1/122. For effective self-government it is worth nothing whatsoever.

The ratio of discrimination is least when the power of the voter in Chatham County (Savannah the county seat) is compared with the voter in Fulton. But even this comparison shows one person in Chatham worth three in Fulton.

Historical Basis and Background of the County Unit System

No political ideal lies behind the County Unit System. It was spawned out of the antagonisms between populous centers and rural counties which extend far back in Georgia history[1]. This antagonism has been kept very much alive in the present day by the County Unit System itself which

[1]Holland, "The Direct Primary in Georgia," University of Illinois Press, 1949, page 44.

by giving "disproportionate weight to rural counties in the choice of state officials—accords great advantage to rabble-rousers with a rustic appeal."[2]

Georgia has not always elected governors and other officials by the acre rather than by popular votes.

As far back as 1823 the State Constitution provided:

> "The Governor shall be elected by persons qualified to vote for members of the General Assembly—and the person having a majority of the whole number of votes given in, shall be declared duly elected Governor of this State."[3]

Today's Constitution similarly provides for popular election of Georgia elective officialdom[4].

Until 1950 no proposal to conduct government by county unit rule has ever been submitted to popular vote, and hence the County Unit System has never had constitutional status.

The system was first foisted upon the state over which it now has effective sway through the action of Democratic political conventions beginning in 1876[5]. But the system applied only to convention representation. For no statewide primary was held until 1898. In that primary there were five public officers who had opposition and the returns declared them to be nominated because of their having received a majority of the votes cast[6].

The county unit rule came through Democratic Party rules to apply in primary elections.

One attempt by Governor Hoke Smith to abolish the system resulted in failure[7].

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[2]Key, "Southern Politics," Alfred Knopf, 1949, page 118.
[3]Constitution of Georgia of 1789, Amendment to Article IV, Section 2.
[4]Constitution of Georgia of 1945, Article V, Section I, Paragraph IV.
[5]Holland, *supra*, page 46.
[6]The Atlanta Constitution, June 7, 1898.
[7]Holland, *supra*, page 46.

Finally, the General Assembly wrote the county unit rule into statute[8].

There the rule remains, safe from any possibility of repeal by a legislature whose composition reflects in the lower house the precise disproportions of the County Unit System.

Effect of the County Unit Rule

The county unit rule has virtually disfranchised the effective Negro vote in Georgia; has done the same to the labor vote; has created the milieu for vicious race baiting campaigns and has corrupted government.

Supporters of county unit rule often defend it as a means of protecting against the so-called evil of city rule. But the chief *present* purposes and effects of the law and the reasons for the present attempt to extend it into the general election are the following:

Primary Effect of County Unit System

1. The representation ratios have not been altered in Georgia since 1868. Yet there has been a prodigious growth in urban counties. (R). Appellants, as residents of the most populous county, are practically disfranchised by the worst of rotten borough systems. All the inhabitants of Fulton County have little voice and their large numbers—almost half a million—are almost totally disregarded in the running of the state. It is far more profitable for a candidate for a state-wide office to excoriate the plaintiffs than to seek their vote.[9]

Appellants are deprived of any power to participate in government effectively or even to protect themselves against the rankest discrimination by government. They have

[8]Georgia Laws 1917, pp. 183-189; Georgia Code of 1933, Sections 34-3212 through 34-3218.

[9]In the Senatorial primary of 1938 Eugene Talmadge made a special plea to rural counties "to give the large urban sections a lacing as they did when they elected him in 1936." Atlanta Constitution, August 22, 1938.

neither the spear of the ballot to accomplish legitimate ends nor the shield to fend off injustice and attack. They are political ciphers and pawns. "Probably condemned the most is the fact that the system breeds demogogues who need not worry about the cities as long as they can appeal to and carry the rural counties."[10]

Measured by every conventional standard, residents of Fulton County are as qualified to vote as residents of rural counties.

Plaintiffs and those similarly situated can show schools which are unsurpassed in the state; wealth and property unequaled; local politics which are known to be machineless; and polls mechanically manned.

The only political machines in Georgia are notoriously dependent on rural support.

On no basis, except violent and selfish prejudice, can the discrimination against plaintiffs be explained—on no basis can it be justified.

2. *The County Unit System Achieves the Virtual Disfranchisement of the Negro in Georgia.*

> "The system nearly disfranchises the Negro population. Almost half of Georgia's Negroes live in the most populous counties. Here the Negro vote has been large. But the County Unit System cancels the Negro vote in these counties—the only counties where Negroes have been able to vote in important numbers. In small counties, where any single vote is at a premium, Negroes generally have been denied the franchise."[11]

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[10]Holland, *supra*, page 48.

[11]The New South, Vol. 4, Nos. 5 and 6, (1949). See also "A Long Dark Night for Georgia?" Harper's Magazine, November, 1948, page 61: "In only one of the 39 counties which comprise Georgia's Black Belt—those counties where Negroes actually outnumber whites—were Negroes allowed to vote in strength [1946 primary]. They were restrained by fear, intimidation, threats of violence, and (most effectively) by illegal purging of the registration lists.

As expert witness, Professor Lynwood Holland testified in this case below, the present day effect of the system is

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About 150,000 Negroes were registered for the 1946 primary. Legal and illegal purging in some 60 counties reduced that number to less than 125,000, and would have reduced it even more except for the firm intervention of federal judges. In counties of the Black Belt most Negroes were kept from even registering. A Taylor County Negro who was murdered by a white man the day after the election was the only Negro in the county who had voted."

The New South, March, 1950, carefully sets forth the connection between the County Unit System and Negro disfranchisement:

"Georgia's unit system was not adopted to curb the Negro vote. When it was written into law in 1917, there was no Negro vote. But it has since proved remarkably effective as a tool of white supremacy.

"In theory, of course, Negroes can register and vote as well as anyone in the rural counties which dominate statewide elections. In practice, however, they emphatically cannot. The reasons: dependency, intimidation, violence.

"In the rural counties most Negroes are hired farm laborers, tenant farmers, or share-croppers. Their whole livelihood depends on their white employers and landlords, who are not often kindly toward Negro voting. The choice between eating and voting is not a pleasant one.

"The Ku Klux Klan has been powerful in Georgia for just these reasons. In a small county where there is a premium on any single vote, the Klan is obviously useful. Any organization would be that could frighten 'undesirables' away from the polls. To give only one example, in Wrightsville, Ga., the Klan staged a parade and cross-burning on the eve of a Democratic primary in 1948. On the following day, not a single Negro voted.

"Less drastic methods are also effective. In the rural counties, discrimination by registrars has been a common practice. Those Negroes who have mustered enough courage to try to register have been met with every conceivable form of evasion and intimidation. They have been kept waiting for hours, day after day; they have been arbitrarily pronounced unfit to vote; they have been told again and again to 'come back in a few weeks.' Once registered, they have been summarily purged from the voters' list a few days before elections.

"The net effect of these discriminatory tactics is apparent: Where their votes would count, Negroes have been widely denied the ballot. They have been able to vote in large numbers only where their ballot is sterilized by the county unit system."

The county unit system is, by its proponents, frequently identified with the white supremacy issue:

"This Master Plan crowd seeks to destroy our traditional Democratic White Primary and our County Unit System of voting. Destruction of one, they know will make the death of the other an easy matter for them." The Statesman (Editor: The People; Associate Editor: Eugene Talmadge), December 19, 1946.

The present Governor of Georgia roundly attacked the filing of the instant suit in a radio address on January 28, 1950, over Atlanta radio station WGST. He said: "There is more behind this suit than meets the eye. It is part of a master plan—to disfranchise the white people in rural areas and enfranchise the great horde of bloc voters in urban centers."

(The term bloc voters in well understood and notorious euphemism for Negro voters.)

practically to eliminate the effective Negro and labor vote in Georgia (R).

3. *It Renders Labor Politically Impotent in Statewide Primaries.*

> "Labor is pitifully weak . . . The unions probably hold at least a hundred thousand votes, but these votes are cast almost exclusively in the big cities—Atlanta, Macon, Columbus, Rome, Augusta, Savannah—where the County Unit System makes them virtually worthless. Labor, therefore, is a political factor in only two of ten Congressional districts and in eight of the 159 counties. To quote Roy Harris [former Speaker of Georgia House of Representatives and political leader in State] 'In a state election, we just forget about Labor.' "[12]

4. *It is a Means of Disfranchising the So-called "Liberal" or "Progressive" Political Elements of the State.*[13]

5. *It Permits the Easier Control of the Effective Election in Georgia—the Democratic Primary.*[14]

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[12] "A Long Dark Night for Georgia?" *Harper's Magazine*, November, 1948, page 61.

The disfranchisement of the labor element is viewed by protagonists of the County Unit System as a positive political good:

The Statesman (Editor: The People; Associate Editor: Eugene Talmadge) of September 5, 1946, reprints an editorial from the Clinch County News: "Without the County Unit System, the labor union elements which are rapidly being organized by radical northern influences will gain a dominant role in our state, politics."

[13] "An arrangement so patently calculated to thwart majority rule invites attack. Its defendants contend that the system permits each county to act as an entity in the choice of officials, an argument not unlike the defense of the electoral college for the election of the President. They rest their case principally, however, on the unblushing assertion that the best government flows from the rural areas, which are free from the 'pinkness' that they associate with cities." Key, *supra*, page 120.

[14] "Denial of representative government in Georgia reaches far beyond the under-representation and disfranchisement of a majority of the State's citizens by disfranchising the residents of the large counties. The county unit system effectively reduces the number of voters necessary to carry statewide elections. With a reduced electorate, a few voters in a few small counties can determine the results of an election. Consequently, the state-wide power of local political leaders and small county machines has been exaggerated out of all proportion. As a result, elections have been open to control." The New South, Vol. 4, Nos. 5 and 6, (1949) page 7. The same point is impressively demonstrated by Key in "Southern Politics," *supra*, pp. 121-123.

I

THE COUNTY UNIT SYSTEM VIOLATES THE EQUAL PROTECTION CLAUSE

Protagonists have frequently claimed for the county unit rule that it was unassailable[15]; they have less frequently asserted it to be constitutional.

County unit rule is the exact logical and actual opposite of equality. The difference is as striking and as potent as the ratio 122 to 1, or 65 to 1, or even 3 to 1.

White is not black and 1 is not 122. No sophistry can conceal the inequality in the county unit rule and no prior consideration of state power can justify it. There is no power in the state prior to the Federal Constitution.

What We Are Not Attacking

Appellants are *not* attacking the right of Georgia to establish the qualifications requisite for electors within the State[16].

Appellants are insisting that once Georgia has established the criteria for the qualification of an elector, all qualified electors must be treated equally.

Appellants are not attacking the Presidential Electoral College. Nor the equal vote in the United States Senate.

The Federal Government is in no way enjoined or commanded by the Fourteenth Amendment.

Furthermore, the great compact of 1787 which became the Federal Constitution is a compromise between theretofore sovereign states. The compact is *sui generis*. Con-

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[15]Until *Smith v. Allwright*, 321 U. S. 649, the county unit rule was unchallengeable because it applied only to primaries. However, since *Smith v. Allwright* and *Chapman v. King*, 154 Fed. (2) 460, there can be no doubt that the denial of Appellants' right of franchise in a Georgia Democratic Primary is a violation of a federally-protected right.

[16]Article I, Section 2, Par. 1, United States Constitution.

tained in the compact were the means of amendment. These means have been followed twenty-one times and the compact changed in twenty-one respects. One of the great and fundamental revisions was the Fourteenth Amendment.

Appellants are not attempting to correct malproportions in legislative representation.

The Court is not asked to juggle boundary lines and accommodate and adjust them to the influx of the new born and the immigrant, the efflux of the dying and the emigrant.

Appellants are merely asserting that one vote is not the same as 122 votes and are requesting the Court to declare judicially that fact and grant injunctive relief upon it.

Meaning of Equal Protection

Prior to the Fourteenth Amendment there could have been no enforcible right to a fair and equal protection of the ballot for State House officers.

While the Equal Protection clause of that Amendment was largely the result of the forces of organized abolitionism, the clause was general in its sweep and its protection has been widely applied to many types and modes of state discrimination.

There is little doubt that while the whole Fourteenth Amendment was, and was so regarded at the time of its adoption, a powerful instrument [17], the Equal Protection

[17]Views of the effect of the Amendment ranged from the alarmist views of Governor Walker of Florida who called it "a measure of consolidation entirely changing the form of government" (Florida Senate Journal, 1866, p. 8), to the more sober expression of Mr. John Bingham who was the actual author of the first section of the Fourteenth Amendment. Mr. Bingham was a member of the Committee of Fifteen which Congress placed in charge of Reconstruction. Mr. Bingham's view of the section was that it was a strong plain declaration that "equal laws and equal and exact justice" should be secured in every state "by the combined power of all the people of every state." Flack, "Adoption of the Fourteenth Amendment," John Hopkins Press (1908), page 150.

clause was known to be the "most sweeping of the three" clauses of Section 1 of the Amendment [18].

The equal protection guaranteed was not "protection" construed in a narrow literal sense. As Mr. Morton of Indiana put it in a debate on the floor of the House of Representatives:

"Protection" as used meant or was equivalent to the "benefit of the law" and in Amendment XIV was intended to promote equality in the States and referred to the laws of the States. The object of the Amendment was, he declared "to strike at all class legislation—to provide that laws must be general in their effect."[19]

The Amendment was never intended to have application to the protection of Negroes only[20]. Indeed, the idea that the Civil War amendments had grown exclusively out of a desire to protect the Negro was successfully attacked before the United States Supreme Court by Roscoe Conklin, a member of the Joint Committee of Fifteen in his argument of the case, *San Mateo County* v. *The Southern Pac. RR. Co.*, 116 U.S. 138[21].

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[18]See leading article by Joseph Tussman and Jacobus ten Broek in 37 Calif. Law Review, p. 341.

"Mr. Hannah, a former United States District Attorney for Indiana, said that those who opposed this section sanctioned class legislation and were willing to permit states to deprive American citizens of life, liberty or property without due process of law." Flack, *supra*, page 150.

[19]Congressional Record, 42nd Congress, 2nd session, p. 847.

[20]"The object of the Amendment was declared to be to throw the protecting arm of the Constitution around all classes, native and naturalized. Under the first section no special codes could be passed as had been done by several states, but all citizens were to be equal before the law . . ." Flack, *supra*, page 144, quoting the views of the Cincinnati Commercial.

[21]The amendment applied to whites as well as Negroes for Conklin said "that complaints of oppression in respect of property and other rights, made by citizens of other states who took up residence in the South were rife, in and out of Congress, none of us can forget; that complaints of oppression, in various forms, of white men in the South,—of 'Union men'—were heard on every side, I need not remind the court.

"In several states, colored men outnumber white men. Suppose in one of these states laws should be contrived by the colored majority or a constitution set up under which the property of white men should be confiscated,

Equal protection guaranteed by the Fourteenth Amendment was not just a guarantee of equal treatment in the courts or in the administration of laws:

> "But early in its career the equal protection clause received a formulation which strongly suggested that it was to be more than a demand for fair or equal enforcement of laws. It was to express the demand that the law itself be 'equal'. In *Yick Wo* v. *Hopkins*[22] Mr. Justice Matthews said that 'the equal protection of the laws is a pledge of the protection of equal laws.' This has been frequently cited with approval and has never been challenged by the Court."[23]

Scope of Equal Protection

The Equal Protection clause has many times been summoned to the protection of equal suffrage [24] and equal education[25], both matters the original control of which is left to the States.

Similarly, see *Buchanan* v. *Warley*, 245 U.S. 60, wherein

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surely the court would not say the Constitution is dumb, but would speak, only if the parties to the record were reversed.

"Those who devised the Fourteenth Amendment wrought in great sincerity. They may have builded better than they knew.

"They vitalized and energized a principle as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore.

"They builded, not for a day, but for all time; not for a few, or for a race, but for man." Kendrick, "Journal of the Joint Committee of Fifteen on Reconstruction," page 30.

[22]118 U. S. 356.

[23]37 Calif. Law Review 341.

[24]*Nixon v. Herndon*, 273 U. S. 536. In this case the U. S. Supreme Court did not even consider the Fifteenth Amendment but rested the decision on equal protection, saying it was unnecessary to apply the Fifteenth "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."

Nixon v. Condon, 286 U. S. 73.

Smith v. Allwright, 321 U. S. 649.

Rice v. Elmore, 165 Fed. (2d) 387.

Davis v. Schnell, 81 F. Supp. 872.

McPherson v. Blacker, 146 U. S. 1.

Snowden v. Hughes, 321 U. S. 1.

[25]*State of Missouri ex rel Gaines v. Canada*, 305 U. S. 337.

the Court dealt a resounding blow to a districting ordinance which was described as being peculiarly in the power of a state to "prevent conflict and ill feeling between the white and colored races of Louisville and to preserve the public ease . . ."

The justices who considered *Colegrove* v. *Green*, 328 U.S. 549, on the substantive question presented by the claim that state action there had violated the Equal Protection Clause, all agreed that it had.

While plaintiffs do not contend that their right to vote for *State House officers* is derived from a federal source, they firmly assert that their right is entitled to federal protection[26] through the Equal Protection clause[27].

Equal Protection and Dilution of Franchise

The Equal Protection Clause was the basis of Mr. Justice Black's discussion of the substantive question in *Colegrove* v. *Green*, supra. In that case the "discrimination ratio" was nowhere greater than 9 to 1.

In *MacDougall* v. *Green*, 335 U.S. 281, a statute under

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[26]Plaintiffs do not raise any privileges and immunities question except on their franchise for the office of United States Senator. The privileges and immunities clause it has been contended does not protect other than federal privileges and immunities. See *Minor v. Happersett*, 21 Wall. 162; *Ex parte Yarbrough*, 110 U. S. 651.

[27]"While the right to vote comes from the State—the right of exemption from the prohibited discrimination comes from the United States." 29 C. J. S. p. 28; *Judice v. Village of Scott*, 168 La. 111, 120 So. 592, cert. den., 280 U. S. 566.

In *McPherson v. Blacker*, 146 U. S. 1, where legislation affecting the right of voters was under consideration, the Court through Mr. Chief Justice Fuller stated: "The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution but the last has been."

Said Mr. Chief Justice Stone by *dictum* in *Snowden v. Hughes*, 321 U. S. 1: "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights," citing *McPherson v. Blacker*, 146 U. S. 1; *Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Conaon*, 286 U. S. 73; *Pope v. Williams*, 193 U. S. at 634. The "discrimination ratio" at bar is in one case 122 to 1, an average of 11.5 to 1, and in many cases as much as 20 to 1.

attack had to do with the formation of political parties. It required that petition to form a new statewide political party and to nominate candidates of such new party must have at least 25,000 qualified voters, including at least 200 from each of at least 50 counties.

In that case, only 9,800 of the 25,000 signatures required had to be from 49 counties in the State. In other words 39% of the signatures had to be from 49 counties and 61% of the necessary signatures could be from one county.

In the largest Illinois county, Cook, containing 52% of the State's population, the law permitted 61% of the signatures. Appellants show that as residents of Fulton County, Georgia, containing 14.5% of the Georgia population, they participate in 1.5% of the State's voting strength.

For all the claimed inequities in the Illinois statute, residents of Cook County were given more than their proportional influence.

The Per Curiam opinion in the *MacDougall* case had the support of a bare majority of the Court. The substantive holding was contained in a single sentence discussing the power accorded by the statute to the less populous counties of the State *on the facts of that case:*

> "But the State is entitled to deem *this* power not disproportionate." (emphasis supplied)

Three members of the Court found the malproportions in the *MacDougall* situation offensive to the Equal Protection clause:

> "That regulation thus discriminates against the residents of the populous counties in the state in favor of rural sections. It therefore lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."

The scholarly comment evoked by the MacDougall case has been encouraging to the plaintiffs.[28] Clearly the Court has not forsaken the unanimous opinion of the Court rendered by Mr. Justice Holmes in *Nixon* v. *Herndon*, supra, that while "States may do a good deal of classifying that is difficult to believe rational . . . there are limits."

There is the undoubted right to equal treatment in registration for voting[29] and in voting and having one's vote counted.[30]

Can these established rights be rendered worthless by the simple expedient of legislative fraud through gross dilution of one's ballot?

Stuffed Ballot Boxes—Legislative Style

Appellants are complaining that their personal right to cast a ballot as qualified voters is being destroyed by the operation of the county unit method of vote consolidation.

There is not the slightest doubt that their right to the franchise is constitutionally protected in the processes of registration and voting.

The next question is this: Is the valid ballot protected against being ignored by election officials or diluted so as to lose its force and effect?

If the ignoring or dilution of a ballot were constitutionally permissible it would indeed amount to the erection of form over substance. Only a very bad case of judicial blindness could justify ballot dilution while presumably protecting the ballot.

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[28]"This treatment (of the *MacDougall* case) gives rise to the strong inference that presented with a clearly arbitrary and disproportionate statute, the court would feel free to invalidate it even though the statute did not involve racial discrimination." 62 *Harvard Law Review*, p. 660.

[29]*Nixon v. Herndon*, supra.

Chapman v. King, supra.

[30]*United States v. Classic*, 313 U. S. 299.

Ex Parte Yarbrough, 110 U. S. 651.

This Court in two cases has held that ignoring of valid ballots for members of Congress and/or the dilution of the same is a violation of rights secured by the Constitution.

In the case *United States* v. *Mosley*, 238 U.S. 383, there was an indictment against election officials under the Civil Rights Act for conspiracy to deprive a voter "from the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The defendants were charged with this crime in that they conspired to ignore the returns from certain precincts and omit them from their returns.

It was established in that case that the right to have one's vote counted and not ignored is a right equally as secured by the Constitution as the right to register and to cast a ballot.

Dilution Prohibited

The Constitution also protects the valid ballot against dilution. In *United States* v. *Saylor*, 322 U.S. 385, defendant election officials were indicted under the same Civil Rights Act for depriving divers citizens of their "rights and privileges to express by their votes their choice of a candidate for Senator and their right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified."

The question in the *Saylor* case was whether the defendants had violated the constitutionally-secured rights of voters by stuffing the ballot boxes with fictitious ballots.

No rights would have been violated if the voters' constitutional protection extended merely from registration to casting of the ballot. Nor would any indictment have been proper if the protection in the counting of the ballot had been limited to the actual counting of the *valid* ballot.

The *Saylor* decision shows that the casters of *valid* ballots are secured against the dilution of their ballots. In that case the defendant election officials had stuffed the boxes with ballots for candidates opposed to those supported by the injured voters.

Dilution by the County Unit Method

Defendant officials consolidating votes under the County Unit System actually take the ballots from outside Fulton County and deliberately water down and dilute the ballots of these Appellants as effectively and as practically as by stuffing ballot boxes. This they do under a legislative enactment by which the practice will forever continue until this Court intervenes to protect Appellants.

These Appellants suffer no sporadic infringement of rights by occasionally dishonest officials as in the *Mosley* and *Saylor* cases; they are victims of a legislative policy.

How the County Unit System Violates The Equal Protection Clause

The County Unit System offends the Equal Protection Clause in the following particulars:

1. The State having *exercised* its right to qualify persons as voters and non voters, the law under attack further divides voters into those who live in small and in large counties, favoring one group and penalizing another.

2. Thus the County Unit System does not treat equally those who are similarly situated.

3. Even within the impermissible classifications of urban and rural voters, the system discriminates. Fulton County contains some 26,500 rural dwellers[21]. This number is greater than the total population of

[21] "Report of the Local Government Commission of Fulton County." (1950). Fulton is the fourth largest farming county in Georgia.

most rural counties in the State. Yet rural voters in Fulton County are permitted only 1/122 of the voting strength given rural voters in Chattahoochee County.

4. City people in Bibb, Chatham, Muscogee, Richmond and other counties are accorded many times the voting power of city dwellers in Fulton County.

5. *Arguendo,* that there is a logical and reasonable distinction between voters in large and small counties, no constitutionally valid purpose can be served by the discrimination between them.

6. *Arguendo,* that a valid constitutional purpose exists justifying that discrimination, no evidence exists that there is a reasonable relation between the end and the means adopted by the Legislature. (The means being the use of the most crass discrimination.)

7. At best the classification which gives rise to the rank discrimination against the plaintiffs, is a constitutionally irrelevant[32] or neutral fact, which cannot form the basis of unequal treatment.

8. Actually the whole basis for the discrimination arises out of antagonism, hostility, and prejudice and is a successful effort to (a) stifle the voice of people in the large counties, (b) deprive progressives in the cities a fair share in government, (c) kill the labor vote, (d) disfranchise the Negro[33]. The police power of the State cannot justify the unequal State treatment of voters to accomplish such ends.

The Art of Classifying

Undoubtedly, a State may for the purpose of legislation engage in a reasonable classification[34].

The classification of voters so that plaintiffs have

[32]Mr. Justice Jackson in *Edwards v. Calif.*, 314 U. S. 160, 185.

[34]*Royster Guano Co. v. Virginia*, 253 U. S. 412.

[33]As the County Unit System began before Negroes could vote in the "white" primary of Georgia, the original purpose of county unit rule could not have included Negro disfranchisement.

1/122nd of the influence of Chattahoochee countians in the vital primaries is unreasonable.

There is no logical, reasonable or constitutional justification for this discrimination:

1. There is no sensible or reasonable distinction between rural *qualified* voters and urban *qualified* voters. The qualification of Georgia voters is derived from the Constitution of Georgia of 1945.[35] This classification of voters is exhaustive. This has been the holding of courts[36] and it is commended by common reason.

No evidence exists that voters in small counties are better citizens than those in Fulton. There is no evidence that they are better schooled, better informed, or less inclined to passion and prejudice than Appellants. It is surely safe to agree with one Fulton County voter that "there may be some men in Chattahoochee County twice as smart as I am but every one of them is not *122 times smarter.*".

The classification under the County Unit System is only reasonable if every voter in the small county is by some mystical fact worthy of several times the voting influence of a Fulton voter.

Have the thousands who come from Echols, Tift, Ben Hill, Toombs, and other counties to live in Fulton, by that fact alone become less worthy and entitled to the franchise?

Is the classification based on reason? Or prejudice?

If on reason, then it must be on some basis and not arbitrary. It must rest on some substantial difference[37]. And that difference must not be altogether illusory[38].

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[35]Article II, Section 1.

[36]*Morris v. Powell*, 125 Ind. 281, 25 N. E. 221.

[37]*Colgate v. Hervey*, 296 U. S. 404, 422; *Sou. R. Co. v. Green*, 216 U. S. 400; *Quaker Cab Co. v. Pa.*, 277 U. S. 389.

[38]*Royster Guano Co. v. Va.*, 253 U. S. 412.

What is the *substantial difference* between any resident of Fulton and Echols counties? They live by the same Constitution, are ruled by the same officers, pay the same taxes[39], are qualified to vote by the same law.

What is the substantial difference between one of the 26,500 *rural* dwellers in Fulton County and the 2,400 in Echols?

What is the substantial difference between the brother who manages a Citizens & Southern Bank in Atlanta and the one who does the same thing in Savannah?

Classification Without Reason

Truly this "classification" is not only without reason; it is absurd. The time is now and this is surely the case to apply the dictum of Mr. Justice Bradley in *Bowman* v. *Lewis*, 101 U.S. 22.

> "It is not impossible that a district territorial establishment and jurisdiction might be intended as, or might have the effect of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. *Should such a case ever arise it will be time enough to consider it.*" (Emphasis supplied)

The class discriminated against by the County Unit System is primarily the urban dwellers against whom a constant stream of invective has been hurled by the protagonists of county unit rule[40].

Yet the Constitution, "neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U.S. 537,559, (dissent of Mr. Justice Harlan).

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[39]Any differentials penalize Fulton not Echols residents. See "Report, Georgia Tax Revision Committee," (1950).

[40]Holland, "The Direct Primary in Georgia," *supra*, pp. 44-48.

Equality of Discrimination

It is no answer that all voters in Fulton and other large counties are discriminated against. The individual is under the Equal Protection Clause entitled to equality of tection, not equality of discrimination. The guarantees of the Fourteenth Amendment are to individuals and not to groups. Plaintiffs have the right to complain and to obtain relief because, irrespective of the situation of others, *their* rights are not being equally protected[41].

Plaintiffs do not complain of the denial of technical niceties of equality. Plaintiffs have not come before this Court asking for the protection of some intellectually purist position. The inequality complained of is not fractional.

Plaintiffs show they have been almost completely deprived of their franchise. No better proof of this is needed than the public insults which Fulton voters continuously receive from the successful politicians in the State.

2. No further demonstration is required that plaintiffs are not similarly treated with others in their same class as qualified voters. One hundred twenty-two is not similar to one; nor 65 to one for the purposes of the Fourteenth Amendment.

3. and 4. Rural dwellers in large counties are treated differently from rural dwellers in small counties. City people in populous counties are not treated as city people in lesser counties. Even within the categories which the County Unit System attempts to establish, voters in those categories are not treated equally.

5. Purely *arguendo*, suppose some reasonable difference between voters in small and large counties exists. Does this hypothetical difference form the basis for permissible gross

[41] See *Mitchell v. U. S.*, 313 U. S. 80.

discrimination? What possible public good could be thereby achieved, or what mischief corrected?

Possible suggestions are:

(a) The County Unit System protects some "county" as opposed to personal interest. But counties are not political entities. Counties are but geographical and administrative subdivisions in which *people* live. The Constitutional guarantees run to these *people*. No "county" interest could be urged to override the Constitutional rights of persons.

The "City Machine" Argument

(b) The possibility that there might be a growth of political machines in Georgia should people in larger counties be permitted equal benefit of the franchise.

This argument ignores the fact that the State political machines known in Georgia have not owed their existence to urban but to rural support[42].

Under our Constitution people have the right to err. The vote cannot be withheld or denied because of the ruling government's fear of the manner in which it may be used. If this fear were a permissible basis of classification, it could be used to establish the total disfranchisement of people in the small counties. For while it may be speculated what urban voters would do with a real ballot, the record of the small county under the county unit rule is clear beyond speculation[43].

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[42] "We cannot talk about morality in government and defend the unit system." Ralph McGill, Atlanta Constitution, 29 January 1950.

[43] "We can expect to see other states make more progress than we because they do not have the county unit system.

"It is this fact too, which further reveals how ridiculous is the argument in behalf of the county unit system. No other Southern State uses it. Are they ruined by labor unions and the Negro vote? Of course not. Are they any worse off than we? Certainly not. The truth is they are better off. Because their governors and departments do not have to trade with and knuckle to every county court house clique—since the appeal is to the ma-

(c) Some sincere idealized romantic notion of the value of the rural as against the urban man. But where is the evidence? And, does the Fourteenth Amendment permit the discrimination against men on the basis of the size of the county in which they live? Are these classes of any legal significance? And why should the North Fulton farmer be less idealized and romanticized than the Gwinnett farmer across the line? Does the accidental drawing of a fictional line make one man worthy and another worthless as a citizen and voter? If location of residence is a proper basis for giving one man 122 votes to another's one, would altitude of residence not also be a proper basis?

On no possible basis is the discrimination in the County Unit System constitutionally justified. The system fails to meet the tests prescribed by the Fourteenth Amendment. These, as outlined in a recent article in the Columbia Law Review, are:

> "Where the constitutionality of legislation has been attacked under the due process clause, the Court has sought to determine whether the law . . . bore a reasonable relationship to a *permissible legislative end.* Where constitutionality has been considered under the equal protection clause, the court has inquired whether, with reference to a valid legislative end, the statutory distinction had a *rational* basis in *genuine* differences between the groups affected. In each instance, the restriction or the classification must be reasonably related to a legitimate purpose." 39 Col. Law Rev. 629, 636. (Emphasis supplied)

These legitimate purposes are those which grow out of needs or dictated or suggested by experience. See *Skinner* v. *Okla.*, 316 U.S. 535.

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jority vote and not to unit votes—they can have a more stable government.

"The county unit system—which no other State in the South employs—is of no earthly use to us. It is a millstone about the neck of efficient government." Ralph McGill, *supra.*

(d) Defendant James S. Peters is quoted in the Atlanta Journal, February 21, 1950, as giving his justification of the discrimination inherent in the County Unit System. It runs this way: "Fulton County . . . has two large newspapers and radio stations" and other influence. The plaintiffs show however that there is no evidence that they own any newspapers or radio stations. Plaintiffs also assert that their constitutional rights may not be violated because of what certain corporations may own by way of property in Fulton County.

Are the Means Reasonable?

6. We pass now to consider whether, *arguendo* a valid purpose justifying gross discrimination against plaintiffs exists, the County Unit System presents a reasonable means of accomplishing the purpose.

Since the only real purpose and effect of the system *is to discriminate,* it cannot be denied that the system is reasonably suited to its *true purpose.* No more admirable system could have been devised to discriminate against the inhabitants of large counties, and no imaginable substitute can make elections simpler of manipulation.

It is difficult to discuss this hypothetical proposition. Its assumptions are so unreal. Yet it is valuable to analyze the system by use of this well developed legal tool.

The county unit rule is one relating to elections. Logic would require that any valid purpose to be accomplished or evil to be corrected by it would relate to the needs of good government.

Good government may not be an entirely objective term; but in an American society it has come very positively to mean a few things.

Popular rule—equal laws—representative, responsible government—these are ideals which few would reject.

Whether one draws authority from the Declaration of Independence[44]; from the Gettysburg Address[45]; from the steadily growing tendency to popular rule[46] even in the areas of the National Government which were compromised in 1787; or from the Constitution of Georgia[47]; or from the judicial authority[48]; the principle is almost universally the same. Good government in America means certainly *inter alia*—Government of the People.

Whether county unit rule is reasonably designed to produce popular government is a question too absurd to discuss.

But even *arguendo* that a county unit system is for the purpose of better effecting good government, is the discrimination produced *reasonably* designed towards the end in view?

No more so than Herod's command ordering the death of all male children born on a certain day because one of them might some day cause his downfall.

Like Herod's command, the county unit rule is too inclusive. Granted that most people who live in large counties are bad citizens and a menace, can we not as in Sodom find 10 righteous men amongst Fulton's 468,000?

The first demand of the classifier is that he obey the

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[44]"The doctrine of equality is, of course, embodied in the Declaration of Independence." 37 Cal. Law Rev., p. 341.

[45]"Government of the People, by the People and for the People . . . "

[46]Seventeenth Amendment to the U. S. Constitution, and recently proposed Lodge Amendment relating to the Electoral College, also the "Lame Duck" or 20th Amendment.

[47]Constitution of Georgia, Article V, Section I, Paragraph IV.

[48]See *Thos. v. Reed*, 285 Pac. 92. *Maynard v. Board*, 84 Mich. 228, 47 NW 756. "The constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. All free representative governments rest on this, and there is no other way in which a free government may be carried on and maintained."

demand of justice to the *individual*. Group guilt is unknown to our jurisprudence.

Appellants say confidently that the legislature is not above the question Abraham proposed to God: "Shall not the Judge of all the earth do right?"[49]

Neither may a classification be under-inclusive[50]. The citizens of Savannah and Augusta are not different or purer than the citizens of Fulton's urban centers. The County Unit System while it discriminates against Chatham and Richmond citizens (when compared to citizens of small counties) does not place the citizens of any community in the situation of the Appellants. The county unit law lays an *unequal hand* on those who are the same as qualified voters and on those who live in the same type communities.

> "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner* v. *Okla., supra.*

Constitutional Irrelevancy

7. *At best*, the place where the voter resides is a constitutionally irrelevant fact and cannot form the basis for discrimination.

Would anyone doubt that a law permitting red-headed people no votes, black-headed people one vote, and blondes sixty-five votes, would on its face violate equal protection requirements?

Some *facts* which show actual *differences* are not a fit basis for classification which is discriminatory. These differences are constitutionally irrelevant.[51]

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[49]Genesis XVIII, 25.

[50]*Skinner v. Oklahoma*, 316 U. S. 535.

[51]Mr. Justice Jackson (dissent) in Edwards v. California, 314 U. S. 160, 182, where it was said speaking of indigence, "The mere state of being without funds is a neutral fact—constitutionally an irrelevance . . ."

The mind of man, his education or lack thereof, his criminal record or lack thereof—these are relevant facts which form the basis of his classification as a voter. But one with the best mind, the highest education and the purest moral soul in Fulton County is denied an effective franchise because of an artificial classification—a pure irrelevance based on place of residence.

8. The courts are very sensitive and alert to protect the individual against state legislation designed against him out of prejudice, hostility and antagonism.

It has even been intimated that the normal presumption of constitutionality might be given less weight where legislation was found to be directed against specific groups, e.g., racial and religious minorities[52].

> "The principle is also now well established that in considering the constitutionality of legislation the Court is not confined by the language of the statute but is entitled to consider all facts relevant to a determination of the statute's actual and natural effect."[53]

Natural Effects of the System

The natural effect of the County Unit System is, as we have seen, to disfranchise people in large counties, to kill the substantial labor vote in the state, to obliterate the only large Negro vote in Georgia, and to keep down any move towards progressive government.

These are effects and purposes which are not sanctioned by the Constitution.

> "The history of the declaration that the equal protection clause prohibits legislation which is discriminatory takes us from the *Yick Wo*[54] to the *Takahashi*[55]

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[52] *U. S. v. Carolene Products*, 304 U. S. 144, 153.

[53] *Bailey v. Alabama*, 219 U. S. 219, 244.

[54] *Yick Wo v. Hopkins*, 118 U. S. 356.

[55] *Takahashi v. Fish & Game Comm.*, 334 U. S. 410.

cases. The doctrine is variously phrased. Sometimes it is expressed in the rule that, at least when touching civil rights, legislation must be 'based on more than prejudice'. Sometimes the Court condemns 'oppressive discrimination' or 'unreasonable and arbitrary discrimination' against certain groups. In *Yick Wo* v. *Hopkins* the discrimination struck down was one for which no reason existed 'except hostility to the (Chinese) race and nationality' and which, therefore, 'in the eye of the law is not justified'. In *Truax* v. *Raich*[56] Mr. Justice Hughes said that 'It is no answer to say, as it is argued, that the act proceeds upon the presumption that 'the employment of Aliens unless restrained was a peril to the public welfare'. The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself . . . ' And to permit this, Hughes adds, would be to convert the equal protection clause into a 'barren form of words'. In *Korematsu* v. *U.S.*[57] this doctrine was repeated with emphasis: 'Pressing public necessity may sometimes justify the existence of such restrictions' curtailing the rights of a single racial group. 'Racial antagonism never can'. Again in *Takahashi* v. *Fish and Game Comm.* the Court asserted that a statute of Congress and the Fourteenth Amendment 'protect' all persons 'against legislation bearing unequally upon them either because of alienage or color'. Finally, in *Kotch* v. *Board of River Pilot Commissioners*,[58] Mr. Justice Black stated: 'Thus selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to the achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold a job because of hostility to his particular race, religion, beliefs, or

[56] 239 U. S. 33, 41.
[57] 332 U. S. 214, 216.
[58] 330 U. S. 552.

because of any other reason having no reasonable relation to the regulated activities.'

"What is striking about these statements is the use of such notions as 'hostility' and 'antagonisms'. Laws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals." 37 *Cal. Law Rev.* 341, 357, 358.

The Court has before it a statute discriminatory on its face. There is no need to resort to a study of the administration of this statute[59] to show violation of the Equal Protection Clause. No extrinsic evidence of any kind is required to establish the bald inequality of the law[60].

Intentional and purposeful discrimination is the very heart of the county unit law. This is the essence of all activity in its administration[61].

Furthermore no special economic situation or police power problem better known to the Georgia Legislature than to the Court recommends the withholding of judgment on the inequality apparent. A man is a man and a ballot a ballot in any state. And no state is entitled to treat qualified men unequally in respect of the ballot anywhere.

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[59] *Neal v. Delaware*, 103 U. S. 370.
[60] *Lane v. Wilson*, 307 U. S. 268.
[61] *Snowden v. Hughes*, 321 U. S. 1.

II

THE COUNTY UNIT SYSTEM AND THE CONSTITUTION

Lessons of 1787

The Fourteenth Amendment is a command which the states must respect regardless of any malproportions of representation in the Senate or indirectness in the Electoral College.

But it has been relentlessly pressed on other occasions that our Federal Government is designedly one of unequal representation. Painters of this picture would erect compromises[62] into principles.

But for whatever they are worth to this discussion, the ideals of the Constitution makers are well delineated.

The following discussion of early constitutional documents refers to legislative representation. Appellants are not complaining of their unequal treatment in this regard, but of the deliberate arbitrary watering down of their valid ballots. But if the ideals of the Constitution require some equality in legislative representation, they certainly demand that Appellees cease the dilution of Appellants' ballots.

The first bill of particulars against sovereign injustice spoke of the King of England thusly:

> "He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them and formidable to tyrants only."[63]

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[62] See "The Federalist," No. 62: "The equality of representation in the Senate is another point, which, being evidently the result of a compromise between the opposite pretensions of the large and the small States, does not call for much discussion."

[63] The Declaration of Independence.

Views of the Framers

In the Constitutional Convention of 1787, leaders such as Alexander Hamilton, James Wilson and Dr. Franklin were clear on the issue of equal participation of citizens in government and they were agreed. The Journals show how Mr. Wilson put the matter:

> "Mr. Wilson . . . entered elaborately in defence of a proportional representation stating for his first position, that, as all authority was derived from the people, equal numbers of people ought to have an equal number of representatives, and a different number of people, different numbers of representatives. This principle had been improperly violated in the Confederation owing to the urgent circumstances of the times.[64] . . . Are not the citizens of Pennsylvania equal to those of New Jersey?
>
> "Does it require 150 of the former to balance 50 of the latter? Representatives of different districts ought clearly to hold the same proportions to each other as their respective constituents hold to each other"[65].
>
> Dr. Benjamin Franklin stated his views as follows: ". . . I now think the number of representatives should bear some proportion to the number represented, that the decisions should be by the majority of members, not by the majority of the States."

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[64]Alexander Hamilton in The Federalist, No. 22, makes the same criticism of the inequalities inherent in the Articles of Confederation: "The right of equal suffrage among the States is another exceptionable part of the Confederation. Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticutt, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common-sense."

[65]Elliott's "Debates" (1907), Volume V, p. 177.

On the motion that "the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation"—the vote was 7 to 3, with Maryland divided.

Thus it was that the several states—*political* and *international entities*—not mere administrative pawns of a state[66]—compacted to establish an equitable relationship in the House of Representatives.

The Journal shows that Mr. Sherman who proposed the compromise of equal suffrage in the Senate also "proposed that the proportion of suffrage in the first branch should be according to the respective numbers of free inhabitants . . ."[67]

The early constitutional history of this Republic amply supports the statement of Mr. Justice Douglas that:

> "The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standard for popular representative government."[68]

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[66]Georgia counties, far from being political units of any independence or sovereignty are nothing more than administrative subdivisions, creatures of the State erected for the convenience of administration. These counties may be consolidated, merged or dissolved without constitutional amendment (Constitution of Georgia of 1945, Article XI, Sec. I, Par. IV and V). Whereas the several states formed the United States, Georgia's counties owe their existence to Georgia and not the reverse.

[67]Elliott's "Debates," *supra*, p. 178.

[68]*MacDougall v. Green*, 335 U. S. 281.

III

PRIVILEGES AND IMMUNITIES VIOLATION

It cannot be doubted that the right to vote for a member of the Congress of the United States is a right secured by the United States, even though the qualifications of said voter are determined by the law of the State[69]. This right of the people to choose their Congressional representatives extends to primary elections. Further, a voter has the right *to have his vote counted* in such a primary. This is a privilege of a United States citizen[70].

The privileges above described relate to "the right to vote for national officers"[71].

The right to vote for the two Senators from each State is a right secured by the Seventeenth Amendment to the Federal Constitution. It is on a precise par with the right to vote for members of the National House of Representatives. Each right is secured by explicit language in the Constitution and cannot be abridged by the States, though the terms on which an individual may qualify for the right may be established by the State, provided the State does not discriminate.

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[69] *Ex parte Yarbrough*, 110 U. S. 651.
Powe v. U. S., 109 Fed. (2d) 147.
Wiley v. Sinkler, 179 U. S. 58.

[70] *U. S. v. Classic*, 313 U. S. 299.
Smith v. Allwright, 321 U. S. 649.

[71] *Twining v. New Jersey*, 211 U. S. 78.

IV

THE POPULAR ELECTION OF SENATORS

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . ."

Amendment XVII. United States Constitution

This right to vote for United States Senators is derived not merely from the Constitution and laws of the State from which the Senators are chosen, but has its foundation in the Constitution of the United States[72].

The violation of the right to elect Senators by popular vote is the abridgment not only of a privilege and an immunity of a citizen of the United States, but a direct violation of the Seventeenth Amendment. A popular election is an election which is participated in by the people at large[73]. It does not mean an election by *counties*.

The Amendment was designed to replace the indirect election of Senators by the state legislatures. Election by legislature or by county is indirect and *non-popular* election. In Georgia the Seventeenth Amendment has resulted in election of Senators by counties in county unit votes instead of by county representatives in a legislature.

In the absence of any further direction or limitation it would be presumed that in any election by the people, as provided in the Seventeenth Amendment, the right of a majority or plurality of those voting would prevail.

Those voting for United States Senator are to be the people of the State—not counties. Unless there is Constitutional authority authorizing election by a 2/3 or some other ratio of votes, the implied rule is that majority or

[72] *U. S. v. Aczel*, 219 Fed. 917.

[73] *Reid v. Gorsuch*, 67 N. J. L. 396, 51 Atl. 457, 459.

plurality shall prevail. This should be plain from the spirit of the Constitution which, as we have already discussed, sometimes compromised the principle but made the compromise *explicit*; from the universal practice in other states; from the rules governing our parliamentary bodies, including the House of Lords and House of Commons in Great Britain. It is a rule which has sound judicial support[74].

The Senators of Georgia are selected in a Democratic Primary. These primary results are equivalent to election and as the County Unit System prevails in these primaries, Georgia Senators are not popularly elected. Appellants, as qualified voters have secured by the Seventeenth Amendment and by the Fourteenth the right to participate in a popular election of Senators. Unless this Court intervenes to save their rights, they will be abridged.

[74] "In carrying out its task, of course, the Board must act so as to give effect to the principle of majority rule set forth in section 9 (a), a rule that is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." *S. Rep. No.* 573, 74th Cong., 1st Sess., p. 13.

Also see 29 *Corpus Juris Secundum*, p. 351, and cases there cited to the following effect: "It is a fundamental principle of popular government that in elections the will of the majority, expressed in the manner authorized by law, must prevail, unless the Constitution otherwise provides."

V

THE DISTRICT COURT HAD JURISDICTION OF THE PARTIES

Appellants in their Complaint below named as defendants the "instruments of discrimination" which by Georgia law are charged with duties in putting into execution the County Unit System which Appellants attack.

Defendants Peters and Blitch did not challenge the jurisdiction of the Court over their persons. The Defendant Committee and the Defendant Party have denied the jurisdiction of the Court as to them.

The Committee and Party were alleged in the Complaint to be composed of persons too numerous to be joined in the action (R), and service was obtained upon these defendants (R) under Rule 17 (b), Federal Rules of Civil Procedure, by service upon the defendants Peters and Blitch who, as Chairman and Acting Secretary, respectively, of the Committee are the executive heads and principal officers of the Committee and the Party. Such service is sufficient to bring the Committee and the Party before the Court. *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344.

The Court below found as a fact that "the Chairman and Acting Secretary of the Executive Committee represent the Democratic Party in the functions of their offices but do not appear to have been authorized by the other members of the party or the Executive Committee to represent them as litigants." (R). The fact of their election to their respective offices is sufficient authorization for the purposes for which they were served. Moreover, the Court below in its "Conclusions of Law" overruled and denied this special defense. (R)

Not a Suit Against the State

Defendants took the position below that the suit was a suit against the State. The Court found as a fact that the Secretary of State did not represent the State nor appear for it (R), and overruled this special defense (R).

Under Georgia statute[75] the Secretary of State of Georgia is required to perform the final essential act to put into effect the nomination of candidates for statewide offices: he must provide the ballots for the general election to the ordinaries of the respective counties of the State, and must certify to the ordinaries the names of all candidates who are to appear upon the ballot. The Secretary of State has the further duty of deciding between any two persons who claim to be nominees of the same party for the same office.

It is fundamental that a State may not be sued without its consent. It is equally fundamental that when State officials, purporting to act under color of a state statute, thereby invade rights secured by the United States Constitution, they are personally subject to suit in federal courts for appropriate relief. The suit is not against the State, but against the individual acting in his official capacity.

Richardson v. *McChesney*, 218 U.S. 487
Truax v. *Raich*, 239 U.S. 33
Ex parte Young, 209 U.S. 123
Sterling v. *Constantin*, 287 U.S. 378
Smyth v. *Ames*, 169 U.S. 466

In the case of *Ex parte Young*, *supra*, the Court dealt with a situation closely analogous to the case at bar, in that the plaintiff there sought to enjoin a state official from performing an act which put into operation and effect an invalid law, even though the statute under which the official

[75]Georgia Laws 1946, p. 75; Georgia Annotated Code, Supplement, Section 40-601 (7).

was acting was itself perfectly valid. On page 157, the Court said:

> "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state and thereby attempting to make the state a party.
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced . . . The fact that the state officer, by virtue of his office, *has some connection with the enforcement of the act*, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." (Emphasis supplied)

In the case at bar, the Secretary of State of Georgia is clothed with a duty in regard to the enforcing of the county unit rule in Georgia: the rule cannot be effective unless the Secretary of State acts to enforce it.

We contend, therefore, that the action is not an action against the State of Georgia; and that this Court has jurisdiction over the parties defendant named in this suit.

VI

THE CASE AT BAR PRESENTS A JUSTICIABLE ISSUE

Appellants are individual qualified voters who seek redress of threatened gross dilution of the value of their votes. Their complaint is directed solely against an arbitrary system of almost total disfranchisement which gives Appellants' votes vastly less weight than other votes cast for the same officials, who will govern Appellants *and* those preferred voters.

Appellants seek no remedy from the political situation which gives Fulton County but three State Representatives and tiny Echols County one, and Fulton County but one in 54 State Senators. Appellants seek only that the votes which they are allowed to cast be given equal weight with all other votes cast for the same officials.

Not a "Political Question"

The case at bar thus squarely presents a question of voters' rights. To that extent, it must be admitted, it is political. There is a clear distinction to be drawn, however, between sovereign, political power controversies and suits by individuals seeking enforcement of rights guaranteed by the Constitution.

The former involve political entities, as in *Georgia* v. *Stanton*, 6 Wall. 50, *Cherokee Nation* v. *Georgia*, 5 Peters 1, and *Massachusetts* v. *Mellon*, 262 U.S. 447; or individuals representing political entities, as in *Fairchild* v. *Hughes*, 258 U.S. 126, and *Massachusetts* v. *Mellon, supra*, where the plaintiffs seek solution of abstract questions of political power, sovereignty and government. The case at bar involves only *individuals* seeking protection of individual rights.

In *Nixon* v. *Herndon*, 273 U.S. 536, 540, Mr. Justice Holmes summarily rejected as "little more than a play upon words" the argument that a suit to redress abridgment of the right to vote was nonjusticiable simply because political. That the right to vote will be protected in a statutory action for damages, see also:

Nixon v. *Condon*, 286 U.S. 73
Smith v. *Allwright*, 321 U.S. 649
Chapman v. *King*, 154 Fed. (2d) 460

And it has long been settled that a criminal statute about the right to vote will be enforced as a justiciable matter.

Ex parte Yarbrough, 110 U.S. 651
United States v. *Classic*, 313 U.S. 299

Four Justiciable Cases

It is our contention that a request for injunction and declaratory judgment does not convert a non-political, justiciable right into a political question of power and sovereignty, and for this proposition we rely upon three decisions of the Supreme Court of the United States and a decision of the Fourth Circuit Court of Appeals:

Smiley v. *Holm*, 285 U.S. 355
Colegrove v. *Green*, 328 U.S. 549
Rice v. *Elmore*, 4 Cir., 165 Fed. (2d) 387, cert. den., 333 U.S. 875.
MacDougall v. *Green*, 335 U.S. 281

The Supreme Court of the United States in *Smiley* v. *Holm*, *supra*, unanimously endorsed the relief that Appellants seek here—an injunction to restrain a State Secretary of State from performing under an invalid statute a duty in regard to an election. Also see *Koenig* v. *Flynn*, 285 U.S. 375; *Carroll* v. *Becker*, 285 U.S. 380.

In *Smiley* v. *Holm*, *supra*, the Court did not challenge

the right of the voter to obtain an injunction against enforcement of the invalid statute, an injunction which affected rights of all voters in Minnesota, even though it is clear from the opinion, page 362, that the "political question" doctrine was specifically invoked:

> "The respondent, Secretary of State . . . insisted . . . that the asserted inequalities in redistricting presented a political and not a judicial question."

We respectfully urge upon this Court that *Smiley* v. *Holm* furnishes precedent for the relief we seek, and for our contention that the issue in the case at bar is not a "political question."

Wood v. Broom Inapplicable

In the case at bar the Court below, speaking through two of its three members, relied upon *Wood* v. *Broom*, 287 U.S. 1, as authority for declaring the issues to be non-justiciable because political. We respectfully urge that the Court misinterpreted the effect of the *Wood* case, both as to its applicability to the case at bar, as will be discussed subsequently, and as to the holding of the case itself.

In *Wood* v. *Broom, supra,* the Court simply held that the Mississippi Redistricting Act did not violate the Congressional Reapportionment Act of 1929. The Court expressly reserved the question of the right of complainant to *equitable* relief, but it is significant that the Court took jurisdiction of the case to decide the right of a voter to complain of operation of the election machinery. By strong inference, *Wood* v. *Broom* is authority for our position that the case at bar does not present a "political question."

Another Justiciable Voting Case

It may be a matter of surprise to Appellees that we rely upon *Colegrove* v. *Green, supra,* as authority for our posi-

tion. We respectfully contend, however, that the *Colegrove* case stands for the proposition that suit by an individual to protect by injunction his political rights is not a "political question" suit, and is justiciable.

Three of the seven justices who participated in the *Colegrove* case held that the issue presented there was a "political question", and further held that the bill should be dismissed for want of equity. Three others were equally certain that the injunction should be granted, and that the issue was justiciable and not political.

The seventh, Mr. Justice Rutledge, joined with the first three in dismissing the case, but made it absolutely clear that his decision was based upon the discretionary power of a court of equity to refuse relief when "the cure sought may be worse than the disease." He was equally clear that the issue was justiciable, basing his decision on that point on *Smiley* v. *Holm, supra.*

Thus four of the seven justices believed the issues in *Colegrove* v. *Green* were justiciable, and not under the "political question" doctrine.

In the *Colegrove* case, citizens, residents and duly qualified voters of Illinois sought a declaration of the invalidity of an Illinois statute dividing the State into Congressional Districts which varied in population, in the worst instance, in the ratio of 9 to 1. (Compare the 65 to 1 ratio of the case at bar.) Plaintiffs also sought injunction to prevent state election officials from holding elections under the districting statute.

Here then is a pattern for the case at bar, insofar as the problem of justiciability is concerned. If *Colegrove* v. *Green* held that the issues therein presented were justiciable, as we respectfully contend it did, then there is a justiciable issue in the case at bar, since, as we will show, the issues of

the *Colegrove* case were much closer to "political questions" than are the issues in the case at bar.

Controlling Distinctions

The controlling distinctions between the *Colegrove* facts and the case at bar make it clear that the "political question" opinion of that case cannot be applied to the case at bar. Three principal factors are apparent in Mr. Justice Frankfurter's opinion as the reasons which lead him and his associates to hold as they did:

(1) Apprehension of the practical consequences of a declaration of invalidity.

(2) Belief that invalidation of the statute would invade the legislative province.

(3) Belief that the controversy involved Illinois as a polity, and was not truly an action to protect individual rights.

The first of these objections to granting of injunctive relief is a question of the Court's discretion to grant or withhold the equitable remedy under the doctrine of "balancing conveniences", and we will therefore treat this objection in Section VII of this brief.

No Invasion of the Legislative Sphere

In the case at bar there can be no doubt that the granting of injunctive relief as to purely state offices would not constitute an invasion of the province of Congress. Granting of the relief prayed as to state offices would not constitute an unwarranted or novel invasion of the province of the Georgia General Assembly.

Every declaration of the invalidity of a state statute invades to some extent the province of the legislature which enacted the statute. The right of a state to manage its

internal affairs is a valuable right, but it is not absolute. There is a paramount authority which enjoins the state to deny to none of her citizens the equal protection of the laws. The adoption of the Fourteenth Amendment by the States effected a surrender by the States of their sovereign rights to discriminate between their own residents.

The only problem of invasion of the exclusive province of Congress presented by the case at bar is with regard to the primary elections for United States Senator. Article I, Section 4, Paragraph 1, of the United States Constitution provides that "the Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."

Voter Qualifications Within Judicial Power

Exclusive Congressional control of the "manner" of holding Federal elections does not mean exclusive control over the individual and his right to vote in those elections. If the word "manner" be interpreted thus broadly, there would be nothing to prevent Congress from completely abolishing by legislative fiat the voter qualifications and voting procedures guaranteed by the Constitution: it could decree legislative selection of Senators, or racial discrimination in voting, or property qualifications for voters.

In *Newberry* v. *United States*, 256 U.S. 232, 257, the Supreme Court of the United States was certain that the "manner" of holding elections for federal officials does not extend so far:

> "Many things are prerequisites to elections or may affect their outcome—*voters*, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of

the candidate; *but authority to regulate the manner of holding them gives no right to control any of these.*" (emphasis supplied)

We do not doubt that Congress possesses untrammeled power to decide whether Representatives shall be elected at large or by districts. But to infer from this principle that Congress has exclusive power to judge qualifications of electors would be to set aside every decision in the long line of voters' rights cases from *Ex parte Yarbrough*[76] to *Rice* v. *Elmore*[77].

Nor is it conceivable that the United States Senate might reject a Senator from Georgia not elected by the county unit device. One might as well suggest the rejection of Senators from South Carolina who were elected by the "device" of allowing Negroes to vote, a right secured through the Federal Courts[78], or that Senators from the 47 states which elect on the basis of popular vote should be denied their seats.

We therefore are satisfied that the relief requested in the case at bar does not in any way require unwarranted judicial invasion of the sphere of a coordinate branch of the government.

Not a Georgia Wrong, but an Individual Wrong

As to the other reason for the holding that the *Colegrove* case presented only political issues and no question of individual right, Mr. Justice Frankfurter stated that "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity . . . In effect this is an appeal to the Federal courts to reconstruct the electoral process of Illinois

[76] 110 U. S. 651
[77] 165 Fed. (2d) 387.
[78] *Rice v. Elmore*, 165 Fed. (2d) 387.
[79] *Colegrove v. Green*, 328 U. S. 549, 552.

in order that it may be adequately represented in the councils of the Nation."[79]

The vital distinction between the *Colegrove* case and the case at bar is apparent. In that case plaintiffs complained that they were denied equal protection in that they had not the same right to vote as was accorded voters in other Congressional districts. *But each complaining voter was being allowed an equal voice with every other voter who was to be represented by the successful candidate*, and, for that matter, each complaining voter had an equal voice with every voter in every other district of the state, in the sense that each voter had equal weight in the selection of the Congressman who was to represent *him*. The inequality complained of was, in truth, *between districts and not between people.*

In the case at bar, Appellants are being treated unequally as *individuals*, that is, their votes are being given a lesser value than others in the state in the selection of officers who will represent *all of the voters in the state.* This discrimination is *between persons, not between districts and political units.*

Not a "Redistricting" Case

It will be said that Appellants are treated equally with other voters in their "district", Fulton County—and this is so. But it is no more than a play upon words to identify an arbitrarily designated unit of election such as is Fulton County under the County Unit System, with a district created as a unit of legislative representation. Appellants are not complaining that Fulton County has but three Representatives in the State House of Representatives, while tiny Echols County alone has one—for Appellants' votes are counted "one man, one vote" for each of the three who represent their county. What Appellants seek is that for every office for which they have the right to vote, their

votes shall be valued equally with all other votes cast for the same office.

Nor do Appellants seek or require any remapping of the state in order that Fulton County shall be adequately represented in the councils of the State or Nation. It is to any mapping at all that Appellants object, when that mapping is for the purpose of arbitrary disfranchisement. They seek no representation for Fulton County—it is entitled to none. The statewide elected officials of Georgia represent no counties, but the people. Appellants ask only to receive the equal treatment which the Constitution of the United States guarantees to people.

A Significant Circuit Court Case

In 1947 the Fourth Circuit Court of Appeals handed down a very significant decision in which the Court, in a case on all fours with the case at bar, unanimously approved the grant of injunctive relief to protect political rights. *Rice* v. *Elmore*, 165 Fed. (2d) 387, cert. den., 333 U.S. 875.

Elmore, a qualified Negro elector, brought suit against officials of the South Carolina Democratic Party, complaining that the defendants had violated his rights arising under the U. S. Constitution in not permitting him to register and vote in a party primary. He asked damages, a declaratory judgment, and injunction against defendants and their successors in office to restrain them from excluding him and other qualified voters from enrolling in the party and voting in party primaries. *The question of damages was reserved* for future jury trial, and the District Court granted the other relief prayed[80].

The defendants appealed the decision to the Fourth Circuit Court of Appeals, which unanimously affirmed the

[80] *Elmore v. Rice*, 72 F. Supp. 516, 528.

judgment below. The Supreme Court of the United States then denied certiorari[81].

Here then is a case in which two Federal Courts took jurisdiction of a suit by an elector to obtain injunction and declaratory judgment to protect his individual right to vote, and to protect the right to vote of all others similarly situated. Both courts necessarily decided that the issue presented a "case" upon which the judicial power could be exercised, which they could not have done had the issue been a "political question."

Rice v. *Elmore* is consistent with previous rulings of the Supreme Court of the United States in *Smiley* v. *Holm*, *supra*, and *Colegrove* v. *Green*, *supra*, on the "political question", and we have been unable to find any Supreme Court decisions which rule to the contrary. *Giles* v. *Harris*, 189 U.S. 475, has been frequently cited as authority for the "political question" doctrine, but its effect has been interpreted to mean that under the facts of that case, the remedy of equity should be withheld because the Court could not enforce its decree by supervising elections[82].

Most Recent Decision on the "Political Question"

Since its four to three decision sustaining justiciability in *Colegrove* v. *Green*, *supra*, the Supreme Court of the United States has had occasion to consider once more the "political question" involved in a request for injunctive relief to protect political rights of individuals. *MacDougall* v. *Green*, 335 U. S. 281.

The Court in the *MacDougall* case *unanimously, and without discussion, assumed jurisdiction of the case.* A majority of the full Court, in a per Curiam opinion, decided

[81] *Rice v. Elmore*, 333 U. S. 875.

[82] *Lane v. Wilson*, 307 U. S. 268, 272; Dissent, *Colegrove v. Green*, 328 U. S. 549, 573.

against the plaintiffs on the *substantive merits of the case.* Three other justices would have granted the injunctive relief prayed *on the merits.* The ninth, Mr. Justice Rutledge, following his previous opinion in the *Colegrove* case, thought the Court should decline to exercise its jurisdiction in equity because of the serious consequences of disrupting the pending election.

Conclusion as to Justiciability

We have discussed four recent cases in which the relief requested was analogous in its "political question" implications to the case at bar. We respectfully urge the Court that, on the basis of these four decisions, the Court has jurisdiction of the case at bar despite the political nature of the personal rights asserted by the individual plaintiffs herein.

VII
PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

After the power of the Court over the parties and subject matter, and the justiciability of the controversy are established, it still remains to be demonstrated that the court has "equitable jurisdiction" to grant the relief prayed.

This issue does not involve the power of the Court to hear and decide the case, but involves that "body of doctrine" which is to guide its decision in determining whether in any given instance a suit is an appropriate one for the exercise of the extraordinary powers of a court of equity.

> "Unlike the objection that the court is without jurisdiction as a federal court, the parties may waive their objections to the equity jurisdiction by consent or by failure to take it seasonably."[83]

[83] *Atlas Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 568.

(A) THE CASE AT BAR IS TIMELY BROUGHT

Appellants seek to prevent irremediable deprivation of their Constitutional rights. The injury has not yet occurred, but the threat of injury is imminent and will eventuate unless this Court intervenes to prevent.

The District Court below found as a fact that a statewide Democratic Primary Election in Georgia will be held on June 28, 1950. (R). The Defendants intend to apply the County Unit System of selecting nominees in that primary. (R). On these facts alone, the discrimination which Appellants seek to avoid is a present and immediate threat, and entitles Appellants to injunctive relief.

Appellants are aware of the strict test they must meet in order to obtain injunctive relief.

> "Where a Federal Court of equity is asked to interfere with the enforcement of a State law, it should do so only 'to prevent irreparable injury which is clear and imminent' "[84].

It seems incontestible, from the 50-year history of statewide Democratic primary elections in Georgia and the expressed intention of party officials to apply the statute under attack in the pending primary election, that the threat of injury is "clear and imminent."

Appellants dare not wait until the primary election has been concluded: Not only will their injury then be irreparable, but they might very well find themselves then precluded under the rule applied in an earlier "county unit suit", where the Supreme Court of the United States refused to decide the matter because the issue had become moot.[85]

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[84] *A. F. of L. v. Watson*, 327 U. S. 582, 593.
[85] *Turman v. Duckworth*, 329 U. S. 675.

Preventive Injunction Cases

If authority be needed for Appellants' position that their suit is not prematurely brought, *Pierce v. Society of Sisters*, 268 U.S. 510; *Pennsylvania* v. *West Virginia*, 262 U.S. 553; and *Carter* v. *Carter Coal Co.*, 298 U.S. 238, are decisive of this aspect of the case. In the *Pierce* case, the statute under attack had not even taken effect at the time suit was filed or at the time of the decision. The Supreme Court of the United States held that the suit was not premature:

> "The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."[86]

Defendants in argument below relied heavily upon the argument that Appellants showed no actual or threatened injury to themselves because they are unable to prove that the candidates for whom they will vote on June 28 will be defeated because of the County Unit System. Defendants buttressed their argument by the further irrelevancy that only a few candidates nominated under the County Unit System have received less than a plurality of popular votes.

We contend that this line of reasoning is wholly specious. It ignores the purely personal nature of Appellants' grievance, that their individual rights are being abridged. Appellants speak not for any particular candidate or political faction, but for their own right to be treated equally under the law.

We do not remember that the complainants in *Smith* v. *Allwright*, 321 US. 649; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; and *Chapman* v. *King*, 154 Fed. (2) 460, were required to show that their votes would

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[86] *Pierce v. Society of Sisters*, 268 U. S. 510, 536.

have changed election results in order to collect their damage. Nor was Elmore[87] made to prove that his vote and the votes of other Negroes would have affected the final outcome in order to obtain injunctive relief.

The principle for which Appellants contend is so well established that it would not seem to require argument. As early as 1703, the English case of *Ashby* v. *White, et al.*, 2 Ld. Raym, put the matter at rest:

> "A man who has a right to vote at an election for members of Parliament may maintain an action against the returning officer for refusing to admit his vote. Tho' his right was never determined in Parliament. And tho' the persons for whom he offered to vote were elected . . .
>
> "Let all people come in, and vote fairly; it is to support one or the other party to deny any man's vote. By my consent if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right, and if this action be not allowed, a man may be forever deprived of it. It is a great privilege to chuse such persons, as are to bind a man's life and property by the laws they make."

(B) FEDERAL COURT IS PROPER FORUM

The case at bar presents issues, the solution of which is purely judicial. Whether or not a remedy is available to Appellants in the State courts, in a case of this nature federally-secured rights are equally enforceable in a federal forum. No administrative functions are delegated to the Georgia courts by the statute under attack, nor is there any incompleteness in legislative process which must first be completed by the State courts before resort to the federal courts. As Mr. Justice Frankfurter put it in *Lane* v. *Wilson*, 307 U.S. 268, 274:

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[87] *Rice v. Elmore*, 165 Fed. (2d) 387.

"To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had . . . But the state procedure open for one in the plaintiff's situation has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies . . . Barring only exceptional circumstances, . . . or explicit statutory requirements, . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts."

We do not understand *Railroad Commissioners of Texas* v. *Pullman Co.*, 312 U.S. 496, or *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, relied on by Appellees, to hold otherwise.

(C) EQUITY WILL PROTECT POLITICAL RIGHTS.

The doctrine that "equity protects only property interests" has been completely discredited.[88] The Federal Courts, directly and by necessary inference, have in recent years come to recognize the peculiar fitness of protecting political rights by flexible decrees which can assure the parties the closest approximation of their normal rights and duties.

Smiley v. *Holm*, 285 U.S. 355

Rice v. *Elmore*, 165 Fed. (2) 387, (Cert. den. 333 U.S. 875)

MacDougall v. *Green*, 335 U.S. 281

In *Smiley* v. *Holm*, as was discussed in Section VI of this brief in connection with the "political question" doctrine, the Supreme Court of the United States by reversing

[88] *Hague v. C. I. O.*, 307 U. S. 496.

on certiorari the denial of injunctive relief by the state court, thereby clearly implied an approval of injunction as a remedy appropriate to secure the political right to equality in voting.

Precisely in point, *Rice* v. *Elmore, supra,* also discussed previously, is a case in which the question was squarely before the Fourth Circuit Court of Appeals. In that case the Court found jurisdiction to grant the relief requested, which required of the Court far greater supervision than is requested in the case at bar.

Latest Expression of the Supreme Court

As on the "political question" issue, *MacDougall* v. *Green, supra,* is the latest expression by the Supreme Court of the United States regarding equitable protection of political rights. Eight members of the Court, as has been discussed earlier in this brief, considered the case on *its constitutional merits.* Had the Court been able to dispose of the case on the ground that equity jurisdiction was absent, it could have avoided a consideration of the substantive constitutional questions raised.[89]

Thus the *MacDougall* case, by strongest implication, is another departure from the traditional view that "equity does not protect political rights", toward the newer view that the practical difficulties inherent in many political situations is but one of the many factors to be considered by the Court in determining whether admitted equity jurisdiction should be exercised.

"Modern View" of Injunctive Relief

This "modern view" is well represented by the concurring opinions of Mr. Justice Rutledge in *MacDougall* v. *Green,* and *Colegrove* v. *Green,* 328 U.S. 549. In each case

[89] *Ashwander v. TVA,* 297 U. S. 288, 346-348.

he acknowledged equity jurisdiction, but thought that equity should withhold its hand because of the practical consequences of a decree, under the facts of each case. We submit that the doctrine urged by Mr. Justice Rutledge is the underlying basis of those decisions which in the past have refused equitable relief in political situations. It is not that equity will *never* protect political rights, but that the consequences of the decree sought must be weighed in the Court's discretion to determine whether equity should or should not withhold its hand.

Statutes under which the case at bar was brought, and under which injunctive relief was granted in *Rice* v. *Elmore*, *supra*, make equitable remedies specifically available for protection of the right to vote. If these statutes have meaning, they must confer equity jurisdiction in such matters on the Federal Courts. It then remains for the Court to determine, in the exercise of its discretion, whether or not the relief should be granted.

Giles v. Harris Distinguished

Giles v. *Harris*, 189 U.S. 475, has been cited frequently as authority for the statement that the "traditional limits of proceedings in equity have not embraced a remedy for political wrongs." The case actually uses that language, but states immediately thereafter:

> "But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seems to us to dispose of the case."[90]

Mr. Justice Holmes, who wrote the opinion of the Court, then proceeds to outline "the difficulties which we cannot overcome" as being, first, the impossibility of forcing the plaintiff's registration under a statute attacked by the plain-

[90] *Giles v. Harris*, 189 U. S. 475, 486.

tiff as void; and second, the inadvisability, even impossibility, of supervising elections, *under the facts of that case.*

Similarly it is apparent that the denial of equitable relief in *Colegrove* v. *Green*[91] was inspired by apprehension of the consequences ensuing upon injunctive decree, *under the facts of that case.* As has been pointed out in Section VI of this brief, four of the seven justices in the *Colegrove* case plainly held that there was basic equity jurisdiction, one of the four concurring in the dismissal because of apprehension of disrupting a pending election.

We will show, in the succeeding argument, that the exercise of equity jurisdiction in the case at bar is not fraught with any of the practical consequences which led the Court in *Giles* v. *Harris* and *Colegrove* v. *Green*, both *supra*, to deny equitable relief.

Impracticability of supervising elections and possibility of disrupting the political fabric of the state have always provided, and will continue to provide, strong argument for refusing equitable relief in a suit to protect the right to vote. We submit, however, that *equity will and should* protect political rights, where the facts of the case do not present difficulties in the exercise of equitable jurisdiction.

(D) NO PRACTICAL DIFFICULTIES TO ENFORCEMENT OF DECREE.

If injunction were granted against operation of the County Unit System there would be no disruptive effects to orderly primary election procedure in Georgia, and no necessity for the Court to supervise any future primary election to insure enforcement of the decree.

The County Unit System was made law in 1917 when the so-called "Neill Primary Act" was adopted[92]. The effect of

[91] *Colegrove v. Green*, 328 U. S. 549.

[92] *Georgia Laws* 1917, pp. 183-189. *Georgia Code of* 1933 Sections 34-3212 through 3218.

the statute was to enforce upon political parties the "county unit" method of consolidating votes cast in statewide primary elections. Prior to its enactment, the method of determination of any political party's candidates in statewide primary elections was left to the discretion of the party.

First State Control of Georgia Primaries

The State of Georgia first assumed the right to control primary elections in 1891, when the General Assembly adopted an act approved by the Governor on October 21, 1891, entitled "An Act to Protect Primary Elections and Conventions of Political Parties in this State, and To Punish Frauds Committed Thereat."[93] This Act, which has appeared unchanged in every Code of Georgia[94] since that date, reads in part, as follows:

> "Every political primary election held by any political party, organization or association, for the purpose of choosing or selecting candidates for office, or the election of delegates to conventions in this State, shall be presided over and conducted *in the manner and form prescribed by the rules of the political party, or organization, or association holding such primary election*, by managers selected in the manner prescribed by such rules . . ." (Emphasis supplied).

Thus, at at early date and continuing to the present, the policy of the State on the subject of primary elections has been to allow each party to conduct its own affairs, free from interference by the State, *except where the State has expressed a mandate on some particular phase of the primary procedure.* Where the State speaks, State law must be followed; where the State is silent, party rules govern. Were the County Unit System of determining nominees

[93] *Georgia Laws* 1890-91, Vol. I, p. 210; *Georgia Code of* 1933, Section 34-3201.

[94] *Codes of Georgia of* 1895, 1910 and 1933.

declared invalid, the party would immediately resume its control over the method of determining nominees.

No Interference with Pending Primary

No session of the General Assembly of Georgia would be required to adopt substitute methods for the County Unit System. The State need not be involved at all, unless it so desires. Only the party would be called upon to adopt some different procedure.

The party may choose to select its nominees on a plurality basis. It may require a majority of the popular votes to nominate. It may, in future years, prefer to select its nominees by convention and do away with the primary altogether (a right which the party now possesses, irrespective of the county unit law). The change required would mean only elimination of the present inequitable system of allowing Appellants to vote and then, in practical effect, neglecting to count their votes.

No other voting procedures will be affected by the decree. Votes will continue to be cast and counted, in precinct, ward and county, as heretofore, on a popular basis. The only change will occur when the party officials *at the top level of the party*, consolidate the returns from the counties. Under the decree prayed they will then be prevented from applying the county unit method of determining nominees.

Section 34-1904 of the Georgia Code Annotated, Supplement,[95] provides that a political party must file notice of the candidacy of its nominees with the Secretary of State at least 30 days prior to the general election, in order that the Party's nominees shall appear upon the general election ballot.

Section 34-3215.1 of the Georgia Code Annotated, Sup-

[95] *Georgia Laws* 1922, p. 100; *Georgia Laws* 1943, p. 292.

plement,[96] provides a method by which the Secretary of State can make certain that the party nominees are those properly entitled to the nomination:

> "Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the Chairman and Secretary of the State Committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the County Unit votes received by each candidate in any such primary election."

Effect of Injunction

The effect of the injunction prayed will prevent the defendants Peters and Blitch from certifying the county unit vote consolidation to the Secretary of State, but will not in any wise affect the necessity for certification of the popular vote consolidation, for it is well established by Georgia decisions that when the valid part of a statute is capable of standing alone, it remains effective despite invalidity of another part of the same statute[97].

The purpose of the statute would appear to be closer control by the State over primary election procedures, by supplying to the Secretary of State, upon whom devolves the duty of certifying to the county ordinaries the nominees who are to appear upon the general election ballot, information forming the basis of the party's decision as to its nominees.

> ". . . The Secretary of State shall certify to the respective ordinaries the names of all candidates for national and State offices who have qualified as such as

[96] *Georgia Laws* 1943, p. 347.

[97] *Bennett v. Wheatly*, 154 Ga. 591 (2).

provided in Section 34-1904 of the Code of Georgia and in case there are one or more persons purporting to represent the same political party or candidate it shall be the duty of the Secretary of State to determine such an issue. The ordinaries of the respective counties shall not be required to add any other names for national and state offices on the official ballot except upon certification of the Secretary of State."[98]

No Supervision Required of Court

Granting of injunctive relief will not in any way require the Court to supervise primary elections in Georgia.

The keystone of the entire primary election system of Georgia, as established by statute, is the Secretary of State. As pointed out above, the necessary final step in the entire primary process is the entrance upon the general election ballot of the nominees of the political parties, and the entire control of this part of the process is placed by law upon the Secretary of State. Until the Secretary of State certifies to the respective ordinaries of the State the names of party candidates, the candidates cannot be placed on the general election ballots by the ordinaries.

The only "supervision" which the Court will be required to perform is to require the Secretary of State to abide by the injunctive decree and deny a place on the general election ballot to any person nominated by means of the County Unit System. It cannot be doubted that the decree of this Court will be effective to restrain the Secretary of State, over whom the Court has jurisdiction *in personam* in this proceeding, and the Secretary of State has answered the complaint that he intends to obey the law (R.). The opinion of Mr. Chief Justice Fuller in *McPherson* v. *Blacker*, 146 U.S. 1, 24, is peculiarly appropriate to this discussion:

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[98] *Georgia Laws* 1946, p. 75; *Ga. Ann. Code* (*Supp.*), Sec. 40-601 (7).

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

Other Decisions Distinguished

In *Giles* v. *Harris*, 189 U.S. 475, the Court refused to grant equitable relief because of the difficulty of supervising state elections so as to force the enrollment upon the voting lists of Alabama of all qualified members of the Negro race. The case at bar obviously presents no analogous difficulties.

In *Colegrove* v. *Green*, 328 U.S. 549, the Court declined to exercise equitable jurisdiction on other grounds: the practical consequences of an injunction, where "the cure sought may be worse than the disease." In that case, granting of a decree would have wiped out the districts by which Congressmen from Illinois were to be elected in an immediate pending election, leaving the State undistricted and requiring either a special session of the Illinois Legislature to redistrict, or the holding of an election at large. The Court, speaking through Justices Frankfurter and Rutledge, felt that the consequent probable denial to the people of Illinois of Congressionally-commanded representation by districts justified the denial of injunctive relief. The case at bar presents no analogous practical consequence of injunctive relief, no action being required to be taken by the State, and no change in the orderly procedure of voting being effected.

An Earlier "County Unit Suit"

An earlier "county unit suit", *Turman* v. *Duckworth*, 68 F. Supp. 744, based refusal of injunctive relief on still another ground not perceivable in the case at bar: the neces-

sity of overturning a completed primary election and *general election* in order to grant the relief required. In that case, brought by voters who had participated in the primary, the time for placing nominees upon the general election ballot had passed, and the candidate of the Democratic Party who had received the majority of the county unit votes for governor was already listed as the sole candidate on the general election ballot.

The Court refused to enjoin the Secretary of State from laying the returns of the *general election* before the General Assembly for determination of the elected governor. We do not question that the Court properly refused to interfere with primary and election results at the request of those who had participated in the primary without protest.

It is equally obvious that Appellants seek no such drastic relief. They are before the Court in good time, asking not the Court's interference in a completed political contest, not the overturning of the results of a primary and general election, but merely the *prior* protection of their right to vote.

Nor are Appellants disgruntled voters, dissatisfied with the results of a primary in which they participated without complaint. Appellants ask only of the Court that they be allowed to participate in *future primaries* on a basis of equality with all others who vote for the same offices.

We have sought to demonstrate the entire absence of any obstacle to the Court's exercise of its injunctive power in the case at bar. We respectfully submit that the grant of equitable relief in this case would have no harmful or disruptive effect upon the established primary election procedure in Georgia, nor would it entail any supervision of elections or party contests by the Court in order to make the decree effective.

VIII

THE RIGHT TO DECLARATORY RELIEF

The right to injunctive relief is so clear in the present case that we will not discuss at any length the *independent* right of Appellants to declaratory relief.

Title 28, United States Code, Section 2201 provides for a declaration of the rights of any interested party, whether or not further relief is or could be sought.

This statute does not, of course, enlarge the Court's jurisdiction of the subject matter, but enlarges only the remedies available to aggrieved parties. Where the controversy is not within the judicial power no declaration can issue, but where the issues are justiciable a declaration is appropriate though the Court find some discretionary reason for refusing injunctive relief.

> *N. C. & S. L. Ry.* v. *Wallace*, 288 U.S. 249
> *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227

Where the case presents justiciable issues, the fact that some essential criterion for equitable relief *as such* is lacking (for example, where there is an adequate remedy at law), will not affect the right to a declaration. In the case at bar we are unable to find any practical reasons which might weigh the "balance of conveniences" against Appellants. Judge Andrews, dissenting below, did not find any "unpalatable practical consequences" of injunctive relief. (R). The majority dismissed the case on grounds of justiciability but did not recognize any discretionary bar to granting the relief prayed. (R).

If this Court finds, as we contend, that the issues here are justiciable, but also perceives some practical reason not apparent to Appellants why injunction should not issue

now, a declaration of Appellants' rights would be in order and would serve a very useful purpose.

The defendant Secretary of State has indicated that he "will obey the law." (R) A declaration of the law should completely settle the matter, since the County Unit System cannot operate without the cooperation of the Secretary of State.

In the event defendants refused to follow the law as declared, Appellants would have the right, under Title 28, United States Code, Section 2202, to reapply to the federal courts for further relief, in equity or at law. Granting of equitable relief would again be a matter of the Court's discretion, under the facts presented to the Court *at that time.*

Sinclair Refining Co. v. *Burroughs*, 10 Cir., 133 Fed. (2) 536.

CONCLUSION

We think we are here by invitation—an invitation from the District Court and from the Supreme Court of the United States.

We are following the suggestion of the District Court in *Turman* v. *Duckworth*, 68 F. Supp. 744, that

> "A better case for interfering with the application of the County Unit rule by the Democratic Executive Committee would have been presented if the plaintiffs had moved promptly to assert its constitutional invalidity and to stop its application when the Executive Committee, which had the right to determine whether the primary or a convention should be held for nominations, did call the primary . . ."

These Appellants have not participated in the primary and then moved to strike its results. They have initiated a timely suit to prevent the otherwise inexorable working of the county unit rule against their rights. They did not even wait to see whether a primary would be held, but risked prematurity and filed their bill before the primary was actually called.

So Appellants came before the District Court in compliance with *its* invitation.

The Supreme Court of the United States in *MacDougall* v. *Green*, *supra*, demonstrated that *degree* of malproportion is a touchstone in franchise cases.

Appellants show this Court the most flagrant disfranchisement case in the United States. And the shocking malproportions have brought a train of evils which are themselves of constitutional significance: Discrimination against larger counties because of *hostility* and *antagonism*; killing off the labor vote; obliteration of the effective Negro franchise; and the stifling of any progressive government.

There can never be an end to county unit rule in Georgia unless the unconstitutionality of the statute is declared by this Court.

Normally, the citizens have it within their power to strike down a vicious and unconstitutional act at the polls. The existence of this possibility does not deter judicial action, and thus normally a people have two protections against unconstitutional laws.

In Georgia, the county unit rule can be voided only through the Courts. This is so for the invincible reason that the Georgia House of Representatives reflects the precise voting strength achieved by the county unit rule.

Perhaps a *constitutional* amendment may be expected to afford relief?

Again plaintiffs and those similarly situated are *forever* foreclosed. For under the Constitution of Georgia all constitutional changes must originate in a favorable vote of *two-thirds* of both houses of the General Assembly.

From 1917 when the system was first enshrined in law until today and until the end of time there has and will never be the slightest hope of repealing the rule—by legislation or by constitutional change.

If Fulton County becomes one million strong and Echols County shrinks to three hundred, *nothing* can change the County Unit System unless this Court acts. Referendum by popular votes can ratify constitutional change in Georgia, but can never initiate it.

Plaintiffs have been up against the incontrovertible fact that this Court is their one last hope within the framework of the Constitution.

The Georgia County Unit System is undemocratic and immoral. It creates conditions of waste, inefficiency and corruption and it undermines faith in government.

The System is undemocratic because it is government by land and not by men; it is immoral because it denies the basic equality of man. It creates waste, inefficiency and corruption because it relieves public officers of accountability to the people.

If democratic government is right; county unit government is bad rule. If the Constitution demands equal treatment, county unit government is unconstitutional.

County unit government is based on a distrust of the people, and on the selfish interest of small groups and of those who do not wish to be elected by and accountable to all of the citizens of the State. The system removes the shield of the vote from the majority and places the spear of oppression in a minority. It is the negation of democracy and the enemy of equal justice.

Appellants assert that the County Unit System is unconstitutional. They base their contentions on the requirements of the Fourteenth and Seventeenth Amendments.

This Court's decision in past attempts to nullify the system ruled only on questions of procedure.

In the minds of fair men and believers in democratic rule, the County Unit System stands indicted and convicted for its violation of American ideals and the American Constitution.

Respectfully submitted,

HAMILTON DOUGLAS, JR.
MORRIS B. ABRAM
Counsel for Appellants.

AFFIDAVIT OF SERVICE

Hamilton Douglas, Jr., being duly sworn, deposes and says that he is one of the Attorneys for Appellants in the above entitled cause, that he gave notice of Appellants' Brief on Petition for Rehearing by depositing on April 26, 1950, in a United States Mail Box in the City of Atlanta a copy of said Brief addressed to each of the attorneys of record for Appellees.

Subscribed and sworn to before me by Hamilton Douglas, Jr., who is to me personally known, this 26th day of April, 1950.

Notary Public